

COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL :
DEFENSE FOUNDATION, :
Petitioner :
 :
v. : **No. 228 M.D. 1012**
COMMONWEALTH OF PENNSYLVANIA, :
And :
GOVERNOR OF PENNSYLVANIA, :
THOMAS W. CORBETT, Jr., in his official :
capacity as GOVERNOR, :
Respondents :

**PETITIONER’S BRIEF IN OPPOSITION TO
RESPONDENTS’ CROSS MOTION FOR SUMMARY JUDGMENT
AND PETITIONER’S REPLY TO RESPONDENTS’ REPSONSE
TO PETITIONER’S MOTIONS FOR SUMMARY JUDGMENT**

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I. DECLARATORY JUDGMENT ACTIONS

Contrary to Respondents and Amici assertions, the Pennsylvania Environmental Defense Foundation ("Petitioner" or "PEDF") is asking this Court solely for relief under the Declaratory Judgments Act ("DJA"), 42 Pa.C.S. §§ 7531-7541. The Declaratory Judgment Act is remedial legislation and is to be liberally construed. 42 Pa.C.S. § 7541(a). Its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. *Id.*

Under the Declaratory Judgments Act, “courts...have the power to declare rights, status and other legal relations *whether or not further relief is or could be claimed.*” 42 Pa.C.S. § 7532, *Wagner v. Apollo Gas Co.*, 582 A.2d 364, 365-366 (Pa. Super. 1990) (citing *Doe v. Johns-Mansville Corp.*, 471 A.2d 1252, 1254 (Pa. Super. 1984) (emphasis in opinion)). Declaratory judgments are nothing more than judicial searchlights switched on at the behest of a litigant to illuminate an existing legal right, status or other relation. *Id.*

In order to sustain an action under the Declaratory Judgment Act a plaintiff must demonstrate an “actual controversy” indicating imminent and inevitable litigation, and a direct, substantial and present interest. *Wagner*, 582 A.2d at 366 (cited by the Commonwealth Court in *Unified Sportsmen of Pa. v. Pa. Game Commission*, 950 A.2d 1120 (Pa. Cmwlth. 2008)).

There is no statute of limitations with regard to declaratory judgment actions. As a result, the four year “catch all” statute of limitations is appropriate.

Id.

The granting of a petition for a declaratory judgment is a matter within the sound discretion of the court of original jurisdiction. *Pitt & Assocs. v. Butler*, 785 A.2d 1092, 1097 (Pa. Cmwlth. 2001). When a court assumes jurisdiction over a declaratory judgment action it has the power to render any relief it considers necessary. *Smith v. York County*, 388 A.2d 1149 (Pa. Cmwlth. 1978).

Section 7533 of the DJA provides in pertinent part that “any person interested under a written contract, or other writings constituting a contract...whose rights, status, or other legal relations are affected by a statute... or contract...may have determined any question of construction or validity arising under the instrument, statute ... (or) contract ... and obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa.C.S. § 7533.

Section 7535 of the DJA states: “Any person interested, as or through an executor, administrator, trustee, or other fiduciary, creditor, devisee, legatee, heir, cestui que trust, in the administration of a trust...may have a declaration of rights or legal relationship in respect thereto:

- (1) To ascribe any class of creditors, devisees, legatees, or others.

(2) To direct the executors, administrators, or trustees to do or to abstain from doing any particular act in their fiduciary capacity.

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Constitutional challenges to a statute's validity may also be decided by declaratory judgment. *Parker v. Department of Labor and Industry*, 540 A.2d 313 (Pa. Cmwlth. 1988), affirmed 521 Pa. 531, 557 A.2d 1061 (1989); *National Solid Wastes Management Assoc. v. Casey*, 580 A.2d 893, 898 (Pa. Cmwlth. 1990) (“Because the Association’s claim is premised on a constitutional violation and because that claim alleges both that the substance of the order violates the legislated regulatory scheme and that the Governor was without either constitutional or statutory authority to issue an order effectively altering that scheme, we must find that an action for declaratory judgment is the appropriate procedure by which to resolve the instant matter.”)

II. RESPONSE TO STATEMENT OF FACTS

A. Procedural History

The procedural history of this case includes the following additional relevant facts not provided by Respondents:

1. On March 30, 2012, Respondents filed preliminary objections to the PEDF petition for review filed on March 6, 2012.

2. Petitioner filed an amended petition for review on April 30, 2012 that removed the Secretary of Budget and the State Treasures as Respondents.

3. On July 24, 2012, Respondents filed preliminary objections to the PEDF amended petition for review.

4. On January 22, 2013, after briefing and oral argument, the Court denied the Respondents' preliminary objections.

5. On March 21, 2103, Respondents filed a response and new matter to the PEDF amended petition for review.

6. On April 4, 2013, Petition filed a response to Respondents' new matter.

7. On August 19, 2013, Petitioner served interrogatories and a request for document production on Respondents.

8. On September 3, 2013, Petition filed a partial motion for summary judgment on standing, including 11 additional affidavits from Petitioner members or member groups (Paul W. Hoffmaster II for PEDF member Pine Creek Preservation Association, Curt Ashenfelter for PEDF member Keystone Trails Association, Russ Cowles for PEDF member Lycoming Creek Watershed Association, Carol Kafer for PEDF member Loyalsock Creek Watershed Association, Ashley A. West for PEDF member Muncy Creek Watershed

Association, Philip T. Krajewski for PEDF member Tiadaghton Audobon Society, Daniel L. Alters for PEDF member Lycoming Audobon Society, Robert Cross for PEDF member Responsible Drilling Alliance, William J. Fry III for PEDF member Slate Run Sportsmen, Ron Comstock and Robert Ross for PEDF member Pine Creek Headwaters Protection Group, and Richard A. Martin for PEDF member Pennsylvania Forest Coalition. Petitioner had previously filed five affidavits from PEDF members as exhibits to its petition for review.

9. On September 15-16, 2013, Petitioner served subpoenas for deposition of Michael DiBerardinis, former Secretary of the Department of Conservation and Natural Resources ("DCNR"), Dr. James R. Grace, former DCNR Deputy Secretary for Parks and Forests, and former Governor Edward Rendell.

10. On September 19, 2013, Respondents responded to Petitioner's interrogatories and request for document production.

11. On October 15, 2013, Respondents filed an application for a protective order and to quash the subpoena served by Petitioner on former Governor Rendell.

12. On October 28, 2013, Respondents filed a response to the Petitioner's motion for summary judgment on standing asserting that partial summary judgment was premature as there had been no discovery on whether

PEDF had been aggrieved, or qualified as aggrieved in a way that provides standing to obtain judicial resolution of its challenge.

13. On November 4, 2013, after argument, the Court denied without prejudice Petitioner's motion for summary judgment to develop an evidentiary record showing that the interests of Petitioner and its members are greater than that of Commonwealth's citizens in general.

14. On November 4, 2013, the Court also granted Respondents' application for protective order and to quash subpoena inasmuch as the governors' understanding of their duties pursuant to Article I, § 27 of the Pennsylvania Constitution is irrelevant to Petitioner's claims that legislative enactments and appropriations violate the Pennsylvania Constitution.

15. On November 21, 2013, Petitioner's counsel deposed former DCNR Secretary Michael DiBerardinis and former DCNR Deputy Secretary James R. Grace. Respondents' counsel were present at the depositions and had the opportunity to and did examine or cross-examine the deponents.

16. On December 5, 2013, Petitioner filed a motion to file a seconded amended petition for review.

17. On December 30, 2013, the Court granted the Petitioner's motion and the PEDF second amended petitioner was deemed filed.

18. The Court issued an order directing Respondents to file and serve their brief in opposition to Petitioner's motion for summary judgment by May 22, 2014.

19. Petitioner also filed a request for expedited consideration of its application for special relief in the nature of preliminary injunction on April 28, 2014.

20. On this same day, Respondents filed an application to stay for six months their obligation to respond to Petitioner's motion for summary judgment so as to allow time for additional discovery. Respondents had not initiated any discovery as of this date.

21. The Court, in its order dated May 9, 2014, granted Respondents until July 3, 2014 to engage in discovery relative to responding to Petitioner's motion for summary judgment and extended their deadline for file their brief in opposition to Petitioner's motion, as well as any dispositive motion of their own, to July 31, 2014.

22. Respondents never initiated any discovery in this matter despite their representations to this Court on several occasions that they needed additional time to do so.

B. Material Facts

Petitioner has responded seriatim to Respondents' facts set forth in their Joint Motion For Summary Judgment. All the facts Petitioner relies on in support of its requests for declaration are either based on law, taken from public documents, and otherwise based on admissions of authorized agents or representatives of party opponents.¹

In considering a motion for summary judgment the court must examine the whole record. A deposition and business records attached as exhibit to a motion for summary judgment filed as part of the certified record are properly relied upon by the trial court in its order for summary judgment. *Kroptavich v. Pennsylvania Power and Light Co.*, 795 A.2d 1048 (Pa. Super. 2002). The court must consider the entire setting of the case, all the papers included in the record that are actually presented as well as the potential record that may be presented at the time of trial. *Schacter v. Albert*, 239 A.2d 841 (Pa. Super. 1968).

¹ It is well settled in this Commonwealth that an agent's statements are admissible as admissions of the agent's principal only if the agent had the authority to make the statements." *National Solid Waste Management Ass'n v. Casey*, 600 A.2d 260, 262 (Pa. Cmwlth 1991), citing *Ligon v. Middletown Area School District*, 584 A.2d 376, 381 (Pa. Cmwlth. 1990); *see also* Rule of Evidence 803(8) (records of public officials or agencies setting forth their activities are not excluded as evidence under the hearsay rule even though declarant is available to testify).

III. SUMMARY OF ARGUMENT

Respondents have attempted to reframe Petitioner's claims to avoid the simple fact that their actions have violated Article I, § 27 of the Pennsylvania Constitution ("Article I § 27"). Respondents assert that the essence of Petitioner's claims are that DCNR has absolute authority in determining whether to lease State Forest and State Park land for oil and gas development, and that the Respondents and the General Assembly have no authority to appropriate money generated from such leasing. Petitioner makes neither claim. Respondents further claim that the standard for applying Article I § 27 should be whether the Respondents' actions unreasonably degraded or depleted public natural resources and that the test for reasonableness is whether the degradation is justified by economic gain.

Article I Protection

In reality, Petitioner's claim is that the plain language of Article I § 27 establishes specific rights of the people that are protected under Article I, and the Respondents have violated them. These rights include:

1. The right to clean air, pure water, and the preservation of natural, scenic, historic and esthetic values of the environment;
 2. The proprietary rights of common ownership of Pennsylvania's public natural resources, both for the people living now and for future generations;
- and

3. The right, as beneficiary of the public trust comprised of their commonly owned public natural resources (the corpus of the trust), to have them conserved and maintained for their benefit, and the benefit of future generations, by the Commonwealth government, designated as the trustee of this public trust.

These constitutional rights reserved to the people “*are excepted out of the general power granted to the government and shall forever remain inviolate*” under Article I, § 25 of the Pennsylvania Constitution.

The rights of the first clause of Article I § 27 apply to the public trust of the second two clauses. Thus, the Commonwealth, in making any decision or taking any action that may cause degradation, diminution, or depletion of the public natural resources, must insure the protection of all three rights of the people established under the Article I § 27 before making the decision or taking the action. In other words, the Commonwealth must consider in advance of the decision or action what the effects would be on each of the people's constitutional rights.

Balancing Rights and Interests

Neither Governor Rendell nor Governor Corbett considered in advance of the decisions and actions being challenged by the Petitioner their effects on any of the three rights established under Article I § 27. They ignore the limitations of Article I §25. Instead, the Respondents rely on the argument that in deciding to

require leasing of State Forests and Parks and taking that money from DCNR, even though the gas extraction causes degradation and diminution of the resources, they are permitted to balance the rights of the people under Article I § 27 against the economic interests of the government, and the government's economic interests are more important.

Article I § 27 does not allow for any such balancing. The public natural resources are owned by the people, not the government, and the government has no right that would allow for the long term lease or sale of our State Parks and Forests public natural resources for revenue to support general government spending. The public natural resources of our State Parks and Forests are not the “cash cow” for the Governor and the General Assembly.

The Governor and General Assembly serve as trustee of these public natural resources with a fiduciary duty is to conserve and protect them so their owners – the people of Pennsylvania, including future generations – can enjoy their clean air, pure water, and the natural, scenic, historic and esthetic value of their environment.

Common Law Public Trust Not Applicable

The Respondents and the Amici rely on the common law concepts of public trust to support their argument that economic balancing is appropriate. But the common law is not applicable to Article I § 27. Under common law, the

government is the owner of the land beneath our rivers and streams and these lands are the limited subject of the public trust. Under common law, the people have the equitable right to use the water over those lands for navigation, commerce and fishing. Under the plain language of Article I § 27, the people are the common owners of the public natural resources, not the government. Under the constitutional law of Article I § 27, the people own the land and other natural resources.

Legislative Actions

According to the Respondents and Amici, the Petitioner asserts that the Governor and the legislature have no right to define the protection afforded by Article I § 27. But Petitioner makes no such argument. Rather, Petitioner asserts that any legislation enacted must be consistent with rights established by Article I § 27, and cannot diminish, degrade or deplete public natural resources. Petitioner's argument is that the Governor (then Governor Ridge) and the General Assembly did pass legislation that further developed the rights and responsibilities established through Article I § 27 – the Conservation and Natural Resources Act of 1995 ("CNRA").

From 1995 to 2009, the Conservation and Natural Resources Act provided for conservation and preservation of the public natural resources and protected the rights of the people. But, in 2009, because the Respondents wanted the money

from the natural gas on our State Forests, they stripped the CNRA and the Department of Conservation and Natural Resources (“DCNR”) of their ability to continue to meet the constitutional obligations under Article I § 27.

Under CNRA, leasing State Parks and Forests for gas extraction was reauthorized even though gas extraction by its very nature causes degradation, diminution and depletion. But the reauthorization was based on specific restrictions. Only DCNR could make the decision to lease; and all the money from the lease and sale of gas would go to DCNR for limited purposes. Most importantly, DCNR was mandated to make both of those decisions consistent with its trustee duties under the limitations of Article I § 27.

Since 1995, the CNRA prescriptions for leasing have worked (at least up to 2009), because DCNR insured that the leases did not affect the three rights of the Article I § 27. DCNR insured the people's rights to clean water, pure air and the natural, scenic, historic and esthetic values of their State Parks and Forests were preserved. They did this by insuring that the resources were conserved and maintained. Under CNRA, DCNR was reauthorized to be the only decision maker on how to distribute the revenue from the leases and sale of the natural gas under the restrictions of the Oil and Gas Lease Fund Act. In accordance with the Lease Fund Act requirements, DCNR used the revenue to purchase additional land to provide new parks and to extend existing parks and forests, to purchase mineral

rights under the forest, and to construct projects, such as dams, trails and other park and forest facilities to enhance the recreational value of the parks and forests.

People's Reliance

Throughout the years, the people relied on these protections, and did not challenge the gas and oil leases. They relied on the fact that the degradation of their resources through gas leases was ultimately beneficial, because they would get the return of the revenue from those leases. The revenue insured the preservation of their rights and the protection and enhancement of their property and their uses.

The people also relied, over the past 19 years, on both the CNRA's further delineation of the obligation to conserve and maintain the public natural resources and DCNR's implementation of those obligations. Under CNRA, DCNR's mission was to "maintain, improve and preserve our State Parks, to manage our State Forest lands to assure their long term health, sustainability and economic use, ... and to administer grant and technical assistance programs that will benefit, rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs." *CNRA defined economic uses as tourism and recreation industry.* 71 P.S. §1340.101(a)(4) & (6).

In 1995, when it was created, the DCNR Bureau of Forestry began its long-term health and sustainability responsibilities under CNRA by establishing its plan

to use “ecosystem management”. Ecosystem management is a system that has developed and evolved over the past 100 years through scientific and academic understanding of managing our forest sustainably both now and for the future. (*Penn’s Woods, Sustaining Our Forests*, 1995, page 8).

Petitioner’s Harm

Petitioner’s members have already experienced those impacts. Exhibits A through N of Petitioner’s Second Amended Petition and Petitioner’s Motion For Summary Judgment set forth 11 new affidavits of individual and group members of the Petitioner. These affidavits innumerate actual experiences of impacts from the early development of gas extraction on the leased State Forest. (See pages 126-133 of Petitioner’s Brief in Support of Summary Judgment.). The experiences and concerns of impacts of Petitioner’s members have been substantiated by DCNR’s recent *Shale-Gas Monitoring Report* (April 2014).

The Respondents have and continue to want, as do the Amici, to use our parks and forests for revenue for other Commonwealth purposes as they see fit, and to ignore the mandates of the CNRA and the DCNR. They argue, and have passed legislation through the recent 2014 Amendments to the Fiscal Code, to insure that decisions to lease State Parks and Forests for gas extraction should be based on their determination of what benefits to the Commonwealth justify leasing State Parks and Forests. These decisions and actions are contrary to their

constitutional obligations to protect the rights established under Article I § 27, as enumerated above.

II. PETITIONER'S RESPONSE TO RESPONDENTS' ARGUMENT

A. Rights of Petitioner's Members

Respondents assert at the beginning of their argument that Petitioners have failed to demonstrate that any protected constitutional right has been violated; that Petitioner never sets forth the elements of any cause of action; and that it is not clear what remedy the Petitioner is seeking. PEDF claims the rights of its members under Article I § 27 have been violated by the Respondents. Petitioner is asking this Court to declare the nature of Respondent's rights and responsibilities. As the Supreme Court clearly articulated in the plurality opinion in *Robinson Township*, and as the arguments of the Respondents and Amici strongly argue, there is a need for that clarification.

To understand what rights are established under Article I § 27, the Court must look to the plain language of the Article to determine those rights. Article I § 27 states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

1. Right to Clean Air, Pure Water and Preservation of Values

As stated in the first sentence of Article I § 27, Petitioner's members have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. They live near and recreate on the public natural resources of Pennsylvania's State Parks and Forests, as established by their affidavits. They therefore have the rights established in the first sentence of the Article. As the Supreme Court stated in *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953-954 (Pa. 2013), “[t]he right delineated in the first clause of Section 27 is presumptively on par with, and enforceable to the same extent as, any other right of the people in Article I”.

Petitioner is requesting this Honorable Court to declare that Petitioner and all other people of the Commonwealth do have this right in their State Parks and Forests.

2. Proprietary Rights

In their Joint Motion and Brief, the Respondents do not address the meaning of the second sentence of the Article, which states that “Pennsylvania’s public natural resources are the common property of the people, including generations yet to come.” This sentence establishes by constitutional mandate that the people own the public natural resources of Pennsylvania as their common property. As Petitioner has argued previously, the language in the second sentence is clear and

unambiguous. The public natural resources are the property – the common property – of the people. The term “property” is a term of law that relates to ownership. The Supreme Court in *Robinson Twp.* states “[t]he second right reserved by section 27 is the common ownership of the people, including future generations, of Pennsylvania’s public natural resources.” 83 A.3d at 955 (emphasis added).²

Article I § 27 does not say that the natural resources are the property of both the people and the Commonwealth government, but just the people; and not just the people who are alive now, but the people in the generations yet to come. This sentence, as the Supreme Court Opinion in *Robinson Twp.* points out, establishes the beneficiaries of the public trust established by the third sentence of the Article, *i.e.*, the people, including the future generations. It also establishes that the public natural resources are the corpus of that trust. *Id.* at 956.

²² The Legislative History of Article I § 27 also supports this conclusion. In an open letter to the public, Franklyn Kury introduced a "Question and Answer" publication to promote a full understanding of the proposed constitutional amendment for the people in preparation for primary election on the May 18, 1970. The second question of the publication asked: “If approved, what will this resolution or amendment do”? Franklyn Kury answered: “The basic provision of the amendment would give the people of Pennsylvania a fundamental legal right to a decent environment. *The amendment also establishes that the public natural resources of the Commonwealth belong to all the people, including future generations, and that the Commonwealth is to serve as Trustee of our natural resources for future generations.*” (Emphasis added). See A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania, Widener Law School Legal Studies Research Paper Series no. 14-18 (July 2014), attached hereto as **Petitioner Exhibit UU**, page 66.

Petitioner is requesting this Honorable Court to declare that Petitioner's members, and all the people of the Commonwealth, do have a proprietary right in the public natural resources of our State Parks and Forests.

a. Common Law Public Trust Doctrine Not Applicable

No single common law public trust doctrine exists. At its most basic, a state's public trust doctrine outlines public and private rights in water and submerged lands by delineating five definitional components of those rights:

- (1) Submerged lands subject to state/public ownership;
- (2) The line or lines dividing private from public title in those submerged lands;
- (3) Waters subject to public use rights;
- (4) The line or lines in those waters that mark the limit of public rights; and
- (5) Public uses that the doctrine will protect in the waters where the public has use rights.

See Robin Kundis Criag, *A comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*. Penn State Environmental Law Review, Vol. 16:1; *see also Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892), *Pollards Lessee v. Hagan*, 484 U.S. 212, 233 (1845) ("It is settled law of this country that ownership of and dominion and sovereignty over lands covered by tidal waters, within the limits of the states,

belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.")

Under the common law public trust doctrine, “the equitable title to submerged lands vests in the public at large, while *the legal title vests in the state, restricted only by the trust*, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.” *City of Milwaukee v. State*, 193 Wis. 423, 449, 214 N.W. 820, 830 (1927).

The Supreme Court in *Robinson Twp.* observed that “the trust’s express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather ... the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania’s citizenry, with the evident goal of promoting sustainable development.” 83 A.3d at 958 (citing *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 727-29 (Ca. 1983) (before state courts and agencies approve use of trust resources, they must consider effect of use upon public trust interests and attempt

to avoid or minimize any harm to those interests; the absence of and objective study of the impacts on natural resources was deemed to hamper proper decision).

The opinion in *National Audubon Society* was written by the Superior Court of California. Unlike Pennsylvania, California does not have a constitutional provision in its bill of rights establishing its public natural resources as the property of the people and limiting the role of the government to that of trustee. The California Superior Court decided *National Audubon Society* based on California's sometimes competing doctrines of common law public trust, which establishes public trust protection for navigation, commerce and fishing, and the California Appropriative Water Rights System, which establishes the principle of “maximum beneficial use” of California’s water. 658 P.2d at 712.

The application of the common law principle that the sovereign has legal title to submerged lands would be inappropriate in the context of the constitutional rights of the people of Pennsylvania to common ownership of Pennsylvania’s public natural resources.

b. Natural Gas and Oil Interest Acquired When State Parks and Forests Were Purchased Are Public Natural Resources

Respondents acknowledge, at page 31 of their brief, that the Supreme Court recognized in *Robinson Twp.* that “public natural resources includes state-owned lands, waterways, and mineral reserves, as well as ambient air, wild flora and fauna (including fish) that are outside the scope of purely private property.” *Id.* at 955.

Minerals, including oil and gas deposits that are part of our State Parks and Forests, are public natural resources, and as such are subject to the same constitutional protections as are our parks and forests. Minerals are just as much a part of the natural resources as are the trees. They differ from trees in that minerals are not renewable. Mineral rights are property rights that can be bought or sold through deeds of sale. A property can be divided by “severing” the mineral from the surface of the property. Approximately 80% of our State Parks are subject to severed privately owned mineral rights. Where the mineral rights are retained with the public lands, they are the common property of the beneficiaries of the public trust.³

c. Sustaining Pennsylvania’s Forest Through Ecosystem Management

The Bureau of Forestry’s Mission Statement identifies mineral resources as part of the public natural resources it needs to manage. The Bureau states that it will accomplish its mission by:

Managing State Forests under sound ecosystem management, to retain their wild character and maintain biological diversity while providing pure water, opportunities for low density recreation, habitats for forest

³ Dan Devlin, Deputy Secretary for Parks and Forests, testified that it his belief the land that is part of the State Parks and Forests belongs to the people of the Commonwealth and is not the Commonwealth's property. Notes of Hearing Testimony (N.T.) at 441. He also testified that the mineral resources that are a part of the State Parks and Forests, such as oil and gas rights that have not been severed, are the property of the public trust and are public natural resources. *Id.*

plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.

DCNR uses this concept of ecosystem management as the basis for determining how to make “environmentally sound utilization of mineral resources”. The people have relied on that commitment for the past 19 years.

The mineral resources are valuable assets of the public trust. They are necessary to preserve the subject of the trust and secure the beneficial uses of our State Parks and Forests in the future for the people of the state. The trustees have the obligation to insure that the use of these mineral resources by sale is for the benefit of the corpus of the public trust, to conserve and maintain the public natural resources, and for the uses of the beneficiaries of the trust, both now and in future generations – uses such as recreation, flood control, and the preservation of natural, scenic, historic and esthetic values of the public natural resources.

For mineral resources to not be considered one of the public natural resources, and to find that the Commonwealth has the right to determine to lease and sell those resources for whatever purpose the Governor or the General Assembly wants to spend the money on would be to eliminate DCNR’s ability to conserve and protect our State Parks and Forests (see Exhibits P-1, P-2, P-3 and P-10, and the hearing testimony of James Grace, Michael DiBerardinis, and John Norbeck summarized in Petitioner’ Addendum to Summary Judgment.)

Petitioner is requesting this Honorable Court to declare that public natural resources include the minerals acquired as part of our State Parks and Forests, and as such these minerals are the common property Petitioner's members and of the people.

3. Rights as Beneficiaries of the Public Trust

The people of Pennsylvania have the rights that accompany being the beneficiaries of the public trust, the corpus of which is our public natural resources. As beneficiaries, the people have the right to have their government serve as trustee with the obligation to conserve and maintain the public natural resources, which are the common property of the people. As beneficiaries, the people also have the right to have their ability to use their public natural resources protected by their government, as trustee, to enjoy the rights guaranteed under the first sentence of Article I § 27, *i.e.*, their rights to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the State Parks and Forests.

Petitioner is requesting this Honorable Court to declare that Petitioner's members and all the people of the Commonwealth do have rights as beneficiaries to the public trust that holds their property – the public natural resources – under Article I § 27.

B. Constitutional Protections Under Article I

1. The Fundamental Rights of the People

Pennsylvania's public natural resources, which include State Forests and Parks, as well as the natural gas and oil that are a part thereof, are constitutionally protected under the terms of Article I § 27. Section 27 was not made part of Article I by accident. The deliberate placement of this provision in Article I is made clear in the legislative history of the adoption of this constitutional amendment. Then Representative Franklyn Kury, the primary sponsor of the legislation necessary to amend the Constitution to add this provision stated for the record:

“Mister Speaker, I rise to introduce a natural resource conservation amendment to Pennsylvania's Bill Of Rights. I do so because I believe that the protection of the air we breathe, the water we drink, the esthetic qualities of our environment, has now become as vital to the good life – indeed to life itself -- as the protection of those fundamental political rights, freedom of speech, freedom of the press, freedom of religion, of peaceful assembly and privacy. The original version of Pennsylvania's Declaration of Rights, which is found in Article I of the state constitution, was enacted at a time when the preservation of freedom in man's political environment was in doubt. At that time the population of the nation was so small and the natural resources so apparently inexhaustible, that the future of the physical environment was taken for granted ... Preservation of our natural resources and environment is of fundamental importance. In fact, if mankind does not solve the challenge of saving his environment all the other great world problems we face may well become moot.”

Petitioner Exhibit UU (Widener Article I § 27 Legislative History) at 6-7.

Article I § 2 clearly articulates that the people have and retain the ultimate power over their government and what their government can do, stating:

All power is inherent in the people, and all free governments are founding on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

Article I § 25 declares the relationship between the people's rights and the government they are creating, stating: “To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” The people of the Commonwealth have thus clearly separated the ownership of the public natural resources from the general powers of the Commonwealth government they have created by establishing their common proprietary ownership of those resources under Article I of Pennsylvania’s Constitution.

The Pennsylvania Supreme Court recognized the importance of the placement of the people's rights in their public natural resources in Article I, stating: “Ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution.” 83 A.2d. at 947 (citing Article I § 25). The Supreme Court further observed that “[t]he limitation is on the State’s power to act contrary to the rights established by Article I § 27”. *Id.* at 951.

The Respondent Governors transgressed against the people's rights established under Article I § 27 by making decisions and taking actions in requiring leasing of our State Parks and Forests for leasing of natural gas for the purpose of obtaining revenue for the General Fund, and using that revenue under their general powers. These decisions and actions have and will continue to degrade and diminish the public natural resources; the rights of the people to clean air and pure water are threatened, the natural, scenic, historic and esthetic value of the State Forests have already been harmed, and the Respondents have violated the proprietary rights of the people by converting their public natural resources to revenue and taking that revenue to be used under their general powers. In taking these actions, the Respondents have ignored their responsibilities and duties as trustees. The authority the Respondents cite for these decisions and actions are the authority of their general powers established by the people under Article III. As expressly stated in Article I § 25, this authority does not allow them to violate the fundamental rights of the people under Article I § 27, which they have done.

Petitioner is requesting this Honorable Court to declare that Respondents actions are in violation of Petitioner's constitutional rights and Respondents' duties established under Article I.

2. The Government is Not Authorized to Balance the Fundamental Rights of the People Against Economic Gain

Both the Respondents and the Amici argue that the Governor and the General Assembly have the right to balance the constitutional rights of the people under Article I § 27 to the public natural resources with the economic interests as the Governor sees them under Articles III and V in the use of revenue that could be gotten from the conversion of those public resources.

The first problem with this argument is Article I § 25. As cited and discussed above, Article I § 2 of our Constitution makes clear that the people determine what is in the constitution and have the inalienable power to define their rights. Under Article I § 25, the people have specifically and intentionally excepted all Article I rights out of the government's general powers, and those rights "shall remain inviolate".

The second problem with their argument is that Article I includes all the rights reserved under Article I § 27. The government, in exercising its "high powers" which we (the people) have delegated, cannot infringe on the ownership rights of the people in their public natural resources, or their rights to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of those resources.

The only right the government has under Article I § 27 to the people's public natural resources is to act as trustee to conserve and maintain them for the benefit

of the people. The people's "benefits" are the benefits derived from clean air, pure water and preservation of natural, scenic, historic and esthetic values of environment, and the benefit of having the public natural resources they own conserved and maintained by their government. To argue as Respondents do that the scope of these benefits extends beyond the public natural resources themselves renders Article I § 27 meaningless. The people's public natural resources cannot be conserved and maintained if they can be sold to pay for general government spending. The government's duty to conserve and maintain the public natural resources requires that the government cannot degrade, diminish or deplete them.

Although extracting natural gas from our Parks and Forests does degrade, diminish and deplete those resources, Petitioner has never argued that such extraction cannot occur. Since the adoption of the Conservation and Natural Resources Act the leasing of State Forests to extract natural gas has always been done to insure that the extraction is environmentally sound. That means that the extraction process does not impact on DCNR's mission to sustain the forest under ecosystem management. However, the nature of this industrial activity by necessity results in degradation to the State Forest (and our State Parks), thus diminishing the people's uses and impacting their rights to their State Parks and Forests. This degradation has always been balanced by using the revenue from the sale of oil and gas from these public lands to benefit and improve those lands and the people's

rights and uses of those lands. That has been accomplished mostly by using much of the revenue to purchase additional State Forest and Park lands, and to construct projects such as dams to create recreational lakes, trails for hiking, biking and other uses, to purchase mineral rights that are privately owned to maintain the integrity of the forests and parks.

While Petitioner does not dispute that spending for other governmental purposes benefits the people, the Commonwealth must find the revenue to pay for those other purposes from other authorized sources, not the degradation of our public natural resources.

Even assuming that the Governor has some independent constitutional or statutory right to lease our State Parks and Forest for oil and gas extraction as Respondents argue, any such right must be balanced against the people's fundamental rights in Article I § 27 and neither Governor Rendell nor Governor Corbett did any such balancing when they decided to lease State Forest and Park land for revenue for the General Fund.⁴ They certainly did not consult with the DCNR to see what the effects of their decisions would be on the impacts to the public natural resources and to their duties under Article I § 27. In fact, both Governors failed to consult with DCNR to understand what the impacts could be,

⁴ The Republican Caucus argues that several of their members stood up to speak for the economic need for gas, but there was no serious evaluation or other effort to balance the needs. Such deliberations are irrelevant to this proceeding.

and ignored DCNR's recommendations against further leasing when it learned of the Governors' plans.

C. Constitutional Duties of Trustee

1. Duty to Conserve and Maintain Public Trust Corpus

The language of Article I § 27 is also clear regarding the government's duty and responsibility to the people. The Commonwealth, through its elected and appointed government, is the trustee of the public trust. The Commonwealth has no ownership of the corpus of the trust. The Commonwealth's sole authority in the public trust provisions of Article I § 27 is to conserve and maintain the public natural resources for the benefit of the people.

The Pennsylvania Supreme Court has described the Commonwealth's duties under the trust in the plurality opinion in *Robinson Twp.*, stating that the terms of the trust "are construed according to the intent of the settlor, which [under Article I § 27], is 'the people.'" 83 A.2d at 956. The Court goes on to state that the terms "trust" and "trustee" are "terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted." *Id.* The Court describes the trustee duties of the Commonwealth under the third clause of Article I § 27 with respect to Pennsylvania's commonly owned public natural resources as "both negative (*i.e.*, prohibitory), and affirmative (*i.e.*, implicating enactment of legislation and regulations)." *Id.* at 955-956.

In its plurality opinion, the Court also described the standard that Article I § 27 imposes on the Commonwealth in carrying out its fiduciary trustee responsibilities. The Court states that as trustee, "the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to 'conserve and maintain' the corpus of the trust [under Article I § 27]. The plain meaning of the terms conserve and maintain implicates the *duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources*. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality." *Id.* at 957 (emphasis added).

In further describing the Commonwealth's fiduciary trustee duty, the Court states that "the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties. *In this sense, the third clause of the Environmental Rights Amendment is complete because it establishes broad but concrete substantive parameters within which to act.* *Id.* (emphasis added). The Court also observes that the public trust paradigm of Article I § 27 "has two obvious implications: first,

the trustee has an obligation to deal impartially with all beneficiaries and, second, the trustee has an obligation to balance the interests of the present and future beneficiaries. *Id.* at 959.

Respondents' actions and decisions which resulted in requiring DCNR to lease State Forests and State Parks for gas extraction in order to obtain revenue for general fund purposes have caused and will continue to cause degradation, diminution and depletion of the corpus of the public trust, *i.e.*, the public natural resources. This degradation, diminution and depletion has harmed and will continue to harm Petitioner's members rights to clean air and pure water, to the natural, scenic, historic and esthetic values, and to their property rights to those resources.

Respondents have violated their duties of loyalty, prudence and impartiality to the beneficiaries' interests and to the corpus of the trust, and have failed to consider the interests of future beneficiaries.

To argue that the Respondents can degrade, diminish and deplete the public natural resources for purposes outside of the trust is without any merit. The Respondents' duties under Article I § 27 are to protect the rights of the people to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of their environment and to conserve and maintain the people's public natural resources. Respondents have violated both their duty to act toward

the corpus of the trust (the public natural resources) with prudence, loyalty and impartiality, and their duty to balance the interests of present and future beneficiaries by taking the revenue from the leases of the land and royalties of the trust for purposes outside of the trust.

2. Leases Executed in Reliance on Use of Money to Benefit State Parks and Forests

Since the enactment of the Oil and Gas Lease Fund, the people of the Commonwealth and the agencies responsible for the public natural resources have relied on the money from the leases to not only prevent any degradation from the gas extraction process, and to restore the public natural resources, but also to improve those resource for the benefit of the resources and the people's uses. When Article I § 27 was passed and the public natural resources became the constitutionally designated property of the people, this reliance became a constitutional requisite. The trustee could not cause the degradation, diminution or depletion of the public natural resources caused by extracting the gas and/or oil without the requisite ability to conserve and maintain the impacts with the revenue from the leases. Further, the natural resources were now the property of the people. The trustee could not convert the Parks and Forests and sell the natural gas that are the property of the people and then take the revenue for purposes outside of the trust.

Under the authority of the Supreme Court Opinion in *Hospital and Healthsystem Assoc. of Pa. v. Commonwealth*, 77 A.3d 587 (Pa. 2013), the reliance of the people and DCNR, as the trustee for the people, on the use of the funds received from the degradation of their State Parks and Forests, and diminution and depletion of their public mineral rights, makes those funds a part of the public trust. The Oil and Gas Lease Fund, the legislative designee of those funds, is therefore not just a “special fund”. It is a trust fund. The Governor has no authority to degrade State Parks and Forests, the property of the people, and take that money for purposes outside of the trust.

The Respondent Governors’ decisions’ to use the Oil and Gas Lease Funds for General Fund purposes, including the approval of the 2009 Section 1602-E, 1604-E and 1605-E Fiscal Code Amendment, as well as the Chapter 25, Act 13 of 2012 amendments to the Oil and Gas Lease Fund Act, and the recent 2014 Amendments to the Fiscal Code, violate their duties under the Public Trust. It further prevents DCNR from doing its statutory and constitutional duty to conserve and maintain the public natural resources because DCNR does not have and will not have control over the funds from the leasing and royalties to maintain their duties. In fact, the 2014 Fiscal Code Amendments provide that the Governor will control those determinations.

As previously requested, the Petitioner respectfully requests that this Honorable Court declare these decisions in violation of the Respondent's duties as fiduciaries, violate Petitioner's members' rights, and are contrary to Article I § 27.

3. Duty to Evaluate Effects Prior To Action or Decision

The Trustee has the obligation to evaluate any action or decision that may degrade, diminish or deplete the natural resources before the decision is made or the action is taken. "Each branch of government must consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action." *Id.* at 952.

a. Duty to Evaluate the Effects of Leasing State Parks and Forests for Revenue

Respondent Governors made no attempt to evaluate the effects of their proposed actions to require leasing of State Forest and Park lands for the purpose of obtaining money for the general fund, either through direct transfer from the Oil and Gas Lease Fund or by requiring DCNR to operate the Agency from the Oil and Gas lease Fund in order to take the General Fund revenue that would have been used to operate the agency to be for other general fund purposes. Nor did they evaluate the effects of amending the Oil and Gas Lease Fund Act through Chapter

25 of Act 13 of 2012, by mandating the transfer of Oil and Gas Lease Fund to the Marcellus Legacy Fund.

The Petitioner hereby requests this Honorable Court to find and declare that Respondents have violated their duty as trustee by failing to evaluate the effects of their decisions to lease State Parks and Forests for gas extract for the purpose of obtaining funds for the General Fund before they made those decisions or took those actions.

b. Duty to Evaluate the Effects of Transfer of Oil and Gas Lease Fund

The Respondent Governors has made no evaluation of the constitutional and legislative impacts of their continuing decisions to take the revenue from the oil and gas leasing away from DCNR through the Amendments to the Fiscal Code, both in 2009 and 2014. Both before and after the adoption of Article I § 27 both the people and DCNR relied on the statutory commitment that the revenue from the leasing would go back into the public natural resources. All of the leases entered into by DCNR and its predecessor DER for oil and gas extraction, up to the 2009-2010 leases mandated by Governor Rendell, were entered into with the explicit condition that the bonus payments for the leases and all the royalties therefrom would be returned to the public trust for the purposes set forth in the Oil and Gas Lease Fund.

Petitioner is requesting this Honorable Court to find and declare that Respondents have violated their duty as trustee by failing to evaluate the effects of their decisions take the Oil and Gas Lease Funds away from DCNR for purposes outside of the interests of the Trust.

D. Statutory Duties of Respondents

The Governor is the Chief Executive Officer of the Commonwealth under Article IV, Section 2 of the Pennsylvania Constitution. PA. CONST. art. IV § 2, "the supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed". The Governor has to obey the laws just like everyone else. There is nothing in the Constitution or in the Conservation and Natural Resources Act that says the Governor is exempt from the terms of the Act. The intention and the complexity of the Act, as outlined in Petitioner's Summary Judgment, bears repeating here.

1. DNCR Designated Trustee With Authority to Lease

The Pennsylvania Department of Conservation and Natural Resources was created in 1995 by the Conservation and Natural Resources Act, 71 P.S. § 1340.101(b), and is the agency given the power and duty to manage our State Parks and State Forests; as well as our rivers, trails, greenways and community recreation and heritage areas consistent with the requirements of Article I § 27, 71 P.S. §§ 1340.101-1340.313.

CNRA incorporates the mandates of Article I § 27, stating: “Pennsylvania’s public natural resources are to be conserved and maintained for the use and benefit of all its citizens as guaranteed by section 27 of Article I of the Constitution of Pennsylvania.” 71 P.S. § 1340.101(a)(1).

CNRA identifies Pennsylvania's State Parks, State Forests, and community recreation and heritage conservation areas as important public natural resources that contribute greatly to the quality of life of Pennsylvania's citizens and the economic well-being of the Commonwealth. 71 P.S. § 1340.101(a)(2)-(7).

CNRA recognized the need for a new department -- DCNR -- to be the advocate for these public natural resources, stating: “State parks, forests and community recreational and heritage conservation areas have lost out in the competition for financial and staff resources because they have no cabinet-level advocate to highlight these issues for the public.” 71 P.S. § 1340.101(a)(9).

CNRA articulates the General Assembly's intent and purpose in creating DCNR, stating:

To create a new Department of Conservation and Natural Resources to serve as a cabinet-level advocate for our state parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs to provide more focused management of the Commonwealth’s recreation, natural and river environments. The *primary mission* of the Department of Conservation and Natural Resources *will be to maintain, improve and preserve state parks, to manage State forest lands to assure their long-term health, sustainability and economic use*, to provide information on Pennsylvania's

ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

71 P.S. § 1340.101(b)(1) (emphasis added).

2. DNCR Mission to Sustain the State Forest Through Ecosystem Management

In 1995, the DCNR Bureau of Forestry, citing its mandates under Article I § 27 and CNRA, defined its mission as follows:

Contained in Article I Section 27 of the Pennsylvania Constitution are these words: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

The mission of the Bureau of Forestry is to insure that the long-term health, viability and productivity of the Commonwealth’s forests and to conserve native wild plants.

The Bureau of Forestry will accomplish this mission by:

Managing state forests under sound ecosystem management, to retain their wild character and maintain biological diversity while providing pure water, opportunities for low-density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.

Penn's Woods, Sustaining Our Forests, DCNR Bureau of Forestry (1995), Exhibit P (inside back cover)⁵; *see also* Deposition Testimony of James Grace, Pages 13-20 and Deposition Exhibit D.⁶

Ecosystem management can simply be defined as an ecological approach to resource management. All aspects of an ecosystem are considered important, and the interdependency of biological and non-biological systems and cycles is recognized as central to this holistic approach. Humans are part of the ecosystem and must be taken into consideration in the development of management strategies. Ecosystem management does not preclude resource use, including timber harvesting, hunting or other recreational activities. The primary goal of ecosystem management is to keep the complex interdependencies of ecosystems intact and functioning well over long periods of time. The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so that they can accommodate short-term stresses and adapt to long-term changes. The key elements include maintenance of a diversity of plants and animals and the proper

⁵ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20026631.pdf.

⁶ The deposition transcripts of James Grace, former DCNR Deputy Secretary for Parks and Forests, and Michael DiBerardinis, former DCNR Secretary, have been filed separately with the Court. The exhibits used for both depositions were the same and have also been filed separately with the Court. When a document cited in this motion has been filed both as an exhibit to the Petitioner's Second Amended Petition and a deposition exhibit, Petitioner provides reference to both exhibit locations. Petition exhibits are labeled as "Exhibits" and deposition exhibits are labeled as "Deposition Exhibits" in this motion for summary judgment, and in Petitioner's brief in support of this motion. Copies of Petition exhibits, but not deposition exhibits are being filed with this motion.

functioning of nutrient, water and energy cycles. *Penn's Woods, Sustaining Our Forests*, Exhibit P at 8; Deposition Exhibit D at 8.

3. Economic Development Under CNRA and Article I § 27

In 1995, under the Conservation and Natural Resources Act, DCNR brought together the Bureaus of State Parks and Forests and the recreation and conservation elements of the former Department of Community Affairs. N.T. at 15. Part of DCNR's mission under the Act, as stated above, **is to sustain the economic use of the forest.**

The General Assembly under the findings and purposes of the Conservation and Natural Resources Act, identified the economic uses intended by declaring that:

“Our State parks and forests and community recreation and heritage conservation areas are critical to the continued success of our tourism and recreation industry, the second largest industry in the State.”

71 P.S. § 1340.101(a)(4); and

"Preserving, enhancing, maintaining and actively managing our system of State parks, forests, community recreation and heritage conservation areas contributes greatly to the quality of life of Pennsylvania's citizens and the economic well being of the State.”

71 P.S. § 1340.101(a)(9).

As described above, one of the General Assembly's purposes in creating DCNR was to have a cabinet level advocate for our public natural resources and **"to administer grant and technical assistance programs that will benefit rivers conservation, trails, and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania."**

71 P.S. § 1340.101(b)(1). Cindy Adams Dunn, former DCNR Deputy Secretary for Conservation and Technical Services, headed the grants program and technical assistance to local governments and nonprofits around conservation, and the conservation landscape initiatives. N.T. at 349-350. Ms. Dunn testified that the Pennsylvania Wilds is one of the Conservation Landscape Initiatives that she helped create to revitalize the local economies through sustainable ecotourism and recreation by developing key assets in the 12-county area in north central Pennsylvania that includes 27 State Parks, two million acres of State Forest in 8 State Forest Districts, including the Pine Creek Rails Trails, an half a million acres of the Allegheny National Forest. N.T. at 341; 45-46.

A 2010 brochure on the Pennsylvania Wilds (Exhibit P-14) enumerates the numerous investments DCNR has made in this Conservation Landscape Initiative. The Pennsylvania Wilds has shown an uptick in economic development and tourism as a result of those investments, and the brochure enumerates the improvements and increases in economic activity by visitors in the area, with

increases in attendance and spending. The brochure highlights the nature resources of the area and markets the Pennsylvania Wilds as an ecotourism outdoor recreation destination. N.T. at 342.

The Pennsylvania Pine Creek Rails Trails Guide (Exhibit P-15) described this valuable ecotourism asset that brings 5 million visitors annually to the Pennsylvania Wilds. Additional funds are needed to complete the trail. N.T. at 346.

The Governor has the obligation to aid DCNR in meeting its and statutory duty to use Pennsylvania's Forests and Parks and community recreation and heritage conservation areas to aid in tourism and economic development of our outdoor recreation industry.

4. DCNR Authority to Lease under CNRA and Article I § 27

CNRA reauthorizes in DCNR, subject to the mandates of Article I § 27, authority previously given to the Department of Forests and Waters “to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests ... whenever it shall appear to the satisfaction *of the Department* that it would be for the best interests of the Commonwealth to make such disposition of those minerals.” 71 P.S. § 1340.302(a)(6) (emphasis added).

CNRA also reauthorizes in DCNR, subject to Article I § 27, the authority previously given to the Secretary of Forest and Waters under the Oil and Gas

Lease Fund Act (71 P.S. §§ 1331-1334) to use rents and royalties generated from State Forest oil and gas leases for projects to benefit the public natural resources managed by DCNR. 71 P.S. § 1340.304(c).

DCNR has thus constructed a specific plan to meet its constitutional mandate to conserve and maintain the public natural resources for the benefit of the people, and to meet its statutory obligations to *maintain, improve and preserve state parks, to manage State forest lands to assure their long-term health, sustainability and economic use*, through its Mission Statement and the development of its ecosystem management strategic plan (*Penn's Woods, Sustaining Our Forests*, Petitioner's Exhibit P).

The Governor has the duty to insure that DCNR has the ability to carry out its obligations, and not to undermine its ability to do so. DCNR has the scientific expertise to know how to meet the constitutional mandates. The Governor must respect both the statutory duty and expertise of DCNR.

The basis for sustainability for the forest is “to retain [the forests’] wild character and maintain biological diversity while providing pure water, opportunities for low level density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.” DCNR's basis for determining whether or not to lease is to insure that the leases would meet the sustainability standards of its mission.

(Testimony of Jim Grace (N.T. at 22) and Dan Devlin (N.T. at 442), the two authors of *Penn's Woods, Sustaining Our Forests*.)

Since the 2008 lease sale, DCNR, including Deputy Secretaries Jim Grace and Dan Devlin, determined and consistently maintained that no further leasing should occur until DCNR could insure that the existing leases will not impact on the standards of sustainability of the forests, and that DCNR can and will restore the forests if the impacts result.

Respondent Governors Rendell and Corbett ignored the CNRA limitations on leasing State Forests. They did not consider that the CNRA gave DCNR the specific responsibility to decide whether to lease, and to do so consistent with Article I § 27. They did not consider whether leasing more State Forest after the 2008 leases might or would impact the forests' wild character, impact the biodiversity, impact the water or air, impact the natural, scenic historic or esthetic values of the forest, impact low level recreation of the forest, or the habitats of plants or animals. In fact, they ignored the repeated warnings of the Secretary and Deputy Secretary of DCNR that no further leases should be allowed until they could be sure that the existing standards for sustainability could be met.

The Respondents wanted the revenue for the leases and royalties from gas extraction. But they did not consider that DCNR was given sole responsibility to

use the revenue for the leases to meet the limited uses authorized by the Oil and Gas Lease Fund Act, consistent with the limitations of Article I § 27.

The Respondents' actions in ignoring and violating CNRA and the DCNR plan to conserve and maintain the public natural resources through ecosystem management is a violation of their duties as trustees under Article I § 27, and a violation of the rights of the Petitioner thereunder.

Petitioner is requesting this Honorable Court to find and declare that the Respondents have violated their constitutional duty as trustee by these actions, and petitioner's members' rights under Article I § 27.

E. Harm to Petitioner's Rights From Respondents Violations

The Pennsylvania Supreme Court stated in *Robinson Twp.* that Article I § 27 "offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term." 83 A.3d at 959. The Court also stated that it "perceives no impediment to citizen beneficiaries enforcing the constitutional prohibition in accordance with established principles of judicial review." *Id.* at 957.

1. PEDF Member Affidavits and Testimony

In the Second Amended Petition, and in the Motion for Summary Judgment Petitioner attached 14 affidavits of Petitioner's members and member groups.⁷

Their harms are summarized in Petitioner's Petition at pages 61-71, and in Petitioner's Motion for Summary Judgment at 126-133.

Two of Petitioner's members testified at the hearing before this Court on the harm they have experienced from Marcellus Shale gas extraction on State Forest land. Cindy Bower testified that she is a member of the PEDF Board, and Vice-Chair of the central region of the State. N.T. at 356. She testified that in 1970, she and her husband lived in the Tiadaghton Forest along Pine Creek. N.T. at 359-360. She continues to use the Forest on a regular basis. The Forest is a part of the Pennsylvania Wilds. This wilderness area is the reason she moved to the area. N.T. at 360. She goes to the forest for the peace and serenity that the forest provides that cannot be found in other places. She uses the forest as a hiker and a climber, she is

⁷ Respondents have had Petitioner's Affidavits since Petitioner file the Motion for Partial Summary Judgment, on September 3, 2013. Twice the Respondents have asked this Court to allow them additional time in the case for the purpose of taking depositions of the Petitioner's members. Respondents have not taken any depositions, or asked Petitioner for any discovery. Eleven of these members are long-established groups whose members live and recreate in the area of the Marcellus Shale development in North Central Pennsylvania. They include the major watershed associations for Loyalsock, Lycoming, Muncy, and Pine Creeks, local Audubon Societies (Lycoming and Tiadaghton), and protective associations, (Forest Coalition, Slate Run Sportsmen, Pine Creek Protective Association, Responsible Drilling alliance, and Keystone Trails).

a canoeist, and she brings her family to visit the forest, go to the villages to eat and stay in the hotels.

Ms. Bower has a master's degree in environmental education, and taught school. She would bring her students to the forest as part of their education. N.T. at 360. She testified that the noise from the drilling activities affected her experiences. N.T. at 363. The construction of new roads and expanding old roads also affected her enjoyment. State Forest roads are typically narrow (no more than 14 feet wide) and canopied by the trees. These scenic roads have been turned into roads 79-130 feet wide to accommodate industrial truck traffic and have no tree canopy. N.T. at 365. Now gas extraction infrastructure borders the State Forest roads that she used to frequent, including brine pits, well pads and pipelines. N.T. at 365. She testified about the smell from the brine pit. She observed an area that had been marked "Environmentally Sensitive Area" that had been replaced by a new road. She testified that she and her family's favorite could no longer drive to their favorite scenic vistas because the road is now closed to all visitors, and the vistas can only be reach on foot. She testified that her husband, her mother and her sister are all handicapped, and cannot walk to the vistas. N.T. at 370-371.

Ms. Bower testified that she flew over the impacted areas in a plane about a year ago and observed that what looked like a giant tinker toy set had been laid

across and fragmented the forest. N.T. at 375-376.⁸ She testified that if further leasing would occur in the State Forest area she frequented, her interests would absolutely be affected even if wells would not be allowed to create any additional surface impact. She based her belief on her personal experiences. The drilling of a well a mile away from her house rattled the windows of her house. The rumbling noise was there all the time. The flare-off of gas from the well creates a brilliant orange flame that lights up the sky. And the noise from it sounds like a freight train or jet engine coming through. N.T. at 378. She experienced significant impacts on her property even though the drilling occurred on other property. She experienced visual impacts from the large well pads, increased truck traffic, and believes having the wells so close affects the property value of her house. She would not buy the property now because of the well pads. N.T. at 379.

Clearly, the rights of Cindy Bower and all Petitioner's members to the preservation of the natural, scenic, historic and esthetic values of the State Forest environment have been impacted. Her right to clean air has been violated by the brine pit. Certainly, her uses of the public natural resources and those of her family have been severely impacted by the fragmentation from the new and enlarged roads, the large well pads, the extensive pipelines, the large brine and the fresh

⁸ See *Shale-Gas Monitoring Report* (April 2014), pages 56-58, 68 (description photographs showing the experienced changes to State Forest roads); pages 25, 35 and 64 (gas infrastructure in the State Forest); page 39 (impoundment); pages 62-63 (gas lines).

water pits, and the many other impacts that have resulted from the shale gas development currently occurring on the State Forest.

But it is the long term cumulative impacts that raise the greatest concerns for Ms. Bower and the other PEDF members. The long term, direct and indirect, cumulative and synergistic impacts have not been evaluated on the almost 700,000 acres of State Forest land currently subject to oil and gas development under DCNR leases or leases of State Forest with privately owned oil and gas rights, or on the over 250,000 acres of State Park lands subject to private oil and gas leases. Additionally, private inholdings of land within and adjacent to the State Parks and Forests , as well as other public land (Game Commission, Fish Commission) adjacent to or within both State Park and Forest lands are also subject to leasing for shale gas development.

The gas extraction for all these areas has and will continue to the impact the air, the water, the land, the trees, the plants and the wildlife of our State Parks and Forests, both now and for future generations as the leases will remain active for many decades—up to 50 years by the estimates of DNCR.

2. DCNR Shale-Gas Monitoring Report (April 2014)

Respondents introduced at the Hearing before this Court the *Shale-Gas Monitoring Report* published by DCNR in April 2014. The report substantiates all the harm experienced by Petitioner’s members, and their concerns for the

cumulative impacts throughout the life of the lease and beyond. The Monitoring Report also substantiates the finding in the Governor’s Marcellus Shale Advisory Committee Report, July 22, 2011. (Exhibit II to Petitioner's Motion for Summary Judgment), which Petitioner has relied on.

The *Shale-Gas Monitoring Report* is DCNR’s “first iteration of our measurements (of impact from gas extraction activity on State forest lands). (Report preface). In its report, DCNR acknowledged the following:

a. ***Unprecedented scale of development:*** Natural gas development, especially at the scale seen in the modern shale-gas era, can have impacts on a variety of forest resources and values, such as recreational opportunities, the forest’s wild character, scenic beauty, and plant and wildlife habitat...All citizens share ownership of the state forest system. (Page 13).

b. ***Wide range of environmental concerns:*** “Shale-gas development raises concerns about a wide range of environmental and social values of the state forest system, including water quality and quantity, plant and animal habitats, core forest areas, recreation and aesthetics, forest soils and air quality.” (Page 27).

c. ***Conversion to non-forest uses:*** “Shale-gas development requires the clearing of forests to construct well pads, roads, pipelines, and other infrastructure. This conversion directly affects forestland by increasing habitat fragmentation and reducing the overall amount of forest cover. Construction activities could impact

plants and animals and their habitat, such as wetlands, forest-interior bird species, and species of concern, including timber rattlesnakes, bats, Allegheny woodrats, and an array of plant species.” (Page 27-28).

d. ***Impact monitoring just beginning:*** The monitoring program began in 2010 when the bureau was authorized to hire 15 staff members. The program began implementation in 2011 when the bureau completed hiring staff, met with advisory committees and began development of monitoring protocols. The data in the report was compiled up to the end of 2012. (Page 4).

e. ***Land impacts:*** The Report found that approximately 1,486 acres of forest land have been converted to facilitate gas development in the core gas districts, including roads, infrastructure and well pads and pipelines; 161 miles of State Forest roads have been converted to industrial use (131 miles of pre-existing roads have been expanded and 30 miles of new roads have been constructed); 191 infrastructure pads have been constructed; and 104 miles of pipeline corridor have been constructed. (Page 4).

f. ***Invasive species:*** The principle damage-causing agents from 2008 to 2012 in the core gas forest districts were gypsy moth, forest tent caterpillar, and frost; 11 non-native invasive plant species were present at 14 of 18 representative pads across the core forest districts. (Page 5).

g. ***Increased pest susceptibility:*** Increased susceptibility to pest attack, especially by nonnative invasive species, may occur wherever there is forest disturbance, especially for trees along newly created edges. The invasive plant with the largest mean population size is the Japanese stilt-grass. However, impacts in the surrounding forest can be discovered only through long-term forest health monitoring. (Page 5).

h. ***Water impacts:*** Monitoring is presently only focused on surface water. Streams in the State Forest areas subject to natural gas development are mostly (71 %) first order, headwater streams, classified high quality or exceptional value streams. Many are identified as having naturally reproducing trout populations by the Fish and Boat Commission. At this early stage of the development of the gas extraction in the state forests. the data collected are primarily for establishing baseline conditions. (Page 6).

i. ***Environmental law violations:*** From 2008 to 2012, DEP investigated 324 incidents on State Forest land, resulting in 308 notices of violations of state environmental laws and regulations. From July 1, 2009 through 2012, the DCNRE Bureau of Forestry reported 264 incidents in 50 different categories directly related to gas development activities.

j. ***Soil impacts:*** Shale gas development often involves earth disturbance activities that require careful planning and oversight to minimize negative effects

on soil quality. DEP regulate earth disturbance activities. DCNR helps to monitor for problems relating to erosion and sediment control and reports issues to DEP. To the extent possible, placement of shale gas infrastructure has avoided wet soils and soils with high runoff potential; 85% of well pads, impoundments and compressor stations were on well drained or excessively well drained soils, which means 15 % were placed on poorly drained soils); 80% were on soils with medium to very low runoff index, which means 20% were on soils with a high runoff index; 70% of pipelines occurred within well-drained to excessively drained soils and with medium to very low surface runoff index, which means 30% were constructed on soils with a high runoff index; 80% of new roads were within medium to very low surface runoff index, which means 20% were constructed on soils with a high runoff index. (Page 6).

k. ***Air impacts:*** Shale gas development involves many stages that provide different avenues for the release of air pollutants. DCNR is not conducting air quality monitoring, and is relying on DEP to conduct studies. (Page 7).

l. ***Fauna (wildlife) impacts:*** State Forest lands are an important source of food, cover, water, and space for wildlife, which are critical components of ecosystems. DCNR manages forested habitat, ensuring that natural biological communities can thrive. Wildlife habitat will change due to shale-gas infrastructure, resulting in more edge and early successional habitat. DCNR is in

the early stages of developing its wildlife monitoring protocols. DCNR will focus on monitoring changes in habitat conditions in relation to shale gas development on State Forest land. (Page 7).

m. ***Recreation impacts:*** Gas development includes extensive infrastructure that requires careful siting to minimize impacts to recreational features. New infrastructure can affect wild character and viewsheds. Noise-generating activities may affect visitor experience. Three designated state forest hiking trails have been impacted. (Page 8). During the winter of 2012-13, 29 State Forests roads totaling 132 miles designated as snowmobile trails (*i.e.*, not plowed) were allowed to be plowed to support shale gas development; 44 State Forest roads totaling 150.6 miles designated as snowmobile trails were closed to snowmobiles due to shale gas development; 20 miles of new snowmobile trails were created, with all but five miles of trail established on new pipelines typically along a State Forest road being used for shale gas development. (Pages 158, 160).

n. ***Visitor experience impacts:*** 46 out of out of 116 comment cards respondents in core gas forest districts indicated that Marcellus activity had changed their visitation experience; 41 out of 116 indicated that Marcellus activity changed their recreational use of the State Forest. (Page 171).

o. ***Scenic drive impacts:*** Heavy truck traffic increases social and environmental concerns related to noise, dust, access limitations, public safety, and

user experience, as well as operational concerns associated with road conditions, maintenance and rehabilitation. The need for road access for shale-gas development has resulted in heavier traffic on state forest roads. Upgraded roads are safer and easier to drive, but many have lost their wild character. One primary attribute of the state forest roads being affected by shale-gas development is the “wild character” of the road. State forest roads, in general, have a traditionally rustic and aesthetically pleasing value and wild character. Scenic pleasure driving is the largest motorized recreational use of state forest lands. Even when other recreational activities are the primary reason for forest visits, most of the visiting public appreciates and values what they see on their way to their ultimate destination. It is important that the wild character of state forest roads be preserved to the greatest extent possible during and after use by gas companies. (Page 36).

The greatest percentage of change in road density has occurred on the Tiadaghton and the Tioga State forests. (Page 44). Traditional state forest roads typically have a closed or nearly closed canopy over the top of the road and are barely wide enough for two passenger vehicles to safely pass each other. Such roads exhibit the wild character and back country experience that state forest users have come to expect. Conversely, shale gas roads are considerably wider, enough for two hauling trucks to pass each other safely, and often the tree canopy has been opened over the road. (Pages 56-60).

p. ***Dust impacts:*** Road dust is created as vehicle tires pulverize the surface aggregate, releasing small particles of dust referred to as fines. These fines from the pulverized material can then become airborne and are known as fugitive dust. Fugitive dust has the potential to be a detriment to forest users' safety, impact personal property, and cause environmental concerns. (Page 68).

q. ***Noise impacts:*** Noise from compression stations can dramatically affect a state forest user's recreational experience and generate conflict. The undeveloped wild character of state forests offers pace, solitude, and a feeling of remoteness for many users. The continuous noise from compressor stations makes them predominantly incompatible with other state forest resources, uses, and values. (Page 168). As of 2012 there are 9 compressor pads in the core gas state forest covering 32 acres and requiring a clearance of 40 acres. (Page 46-47). Initial measurements at 6 out of 7 operating compressor stations measured on state forest lands were louder than the 55 db(A) suggested by the DCNR Guidelines for Administering Oil and Gas activity on State Forest Lands. (Pages 168-169).

r. ***Timber impacts:*** Initial analysis shows that some timber management activities in core gas forest districts may be shifting away from areas leased for shale-gas development. Shale-gas development is decreasing harvest timber revenue due to increases in bonding costs for Route 44 from heavy hauling associated with shale-gas development. (Page 9).

s. ***Pipeline impacts:*** Pipeline construction has the greatest potential to cause forest conversion and fragmentation due to the length and quantity of pipelines required. (Page 40). As of the end of 2012, 104 miles of pipelines have been constructed to support shale gas development. With previously existing pipelines there are now 843 miles of pipeline corridor within the gas state forest districts. (Page 49). These pipelines include 35 stream crossings in the core gas state forest districts constructed by an open-cut trench across the stream or by horizontal directional drilling. These crossings represent a potentially significant impact on streams and rivers in State Forests. Open-trench crossings represent a direct impact on riparian vegetation, stream bed and water. (Page 50).

t. ***Gas well development impacts:*** Approximately 3,000 wells may be drilled on state forest lands to fully develop the current leased acreage. Approximately 568 wells have been drilled by the end of 2013. State forest lease tracts are estimated to be approximately one-fifth developed. However, future development patterns are difficult to accurately predict. (Page 9)

u. ***Impacts to wildness of State Forest:*** On severed state forest lands the deed reservations are such that the Commonwealth has little or no ability to directly control gas management activities due to the rights of the subsurface owner, reserved in the deed. (Page 26). Forest management must take into consideration both direct and cumulative, landscape level impacts of shale gas

development over time. This initial report focuses on impacts of shale-gas development to forest conversion, the value of wild character, forest fragmentation, and restoration. From shale-gas development on State Forest land through 2012, the State Forest has experienced a loss of 19 acres of primitive (remote) areas; 8,409 acre in semi-primitive non-motorized area; and 913 acre decrease in semi primitive motorized area. (Page 164).

v. ***Forest fragmentation impacts:*** Pennsylvania's State Forests, particularly those in the north-central part of the State, help comprise the largest continuous block of forest in the northeastern United States. The fragmentation of large core blocks of forest by disturbances that create increased forest edge can create conditions that alter the biodiversity and ecosystem health of the forest. (Pages 206-207). The State Forest Districts experiencing the greatest shale gas development are also experiencing the greatest forest fragmentation. The largest increase in edge forest has been experienced in the Tiadaghton State Forest (1,813 acres), followed by the Tioga State Forest (1,257 acres). (Page 213). The total increase in forest edge has been 4,355 acre. (Page 214, Table 16.5). The highest loss in large core forest blocks also occurred in the Tiadaghton State Forest with a loss of 3,147 acres, again followed by the Tioga State Forest with a loss of 2,798 acres of large core forest. In total, 9,241 acres of large core forest have been lost as a result of the shale gas development. (Page 214-215).

F. Respondents Failed to Consider the Tourism and Recreation Economic Value of our State Parks and Forests

The Respondents have failed to consider their statutory and constitutional mandate to enhance our public natural resources to develop the economic value of those resources to our tourism and recreation industry. (*See* Section II.D.3 above). The Pennsylvania Wilds is being marketed as a wilderness experience. When people drive through the area and encounter industrial natural gas drilling activities, truck traffic and forest areas fragmented by this activity, their experience is impacted. N.T. at 343. The geographic relationship between the Pennsylvania Wilds and the State Forest subject to gas extraction in the Marcellus Region is almost identical. *Id.* About 40 % of the State Forest in the Pennsylvania Wilds has been leased for natural gas development now. N.T. at 343.

In his 2009 memorandum (Exhibit P-3), former DCNR Secretary Michael DiBerardinis wrote: "It would scar the economic, scenic, ecological, and recreational values of the forests, especially the most wild and remote areas of our state in the Pennsylvania Wilds. Your (the Governor's) work and investment in rural economic revitalization through the outdoor experiences in the Pennsylvania Wilds could be erased." N.T. at 247. He was concerned that over drilling could ruin the economic investments in ecotourism and outdoor venues in the Pennsylvania Wilds. N.T. at 247. In the *Shale-Gas Monitoring Report*, a survey of users of this area indicated that 46 out of 116 visitors reported their visitation

experiences were impacted by the Marcellus shale gas development, and 41 out of 116 indicated the gas development had changed their recreational use of the State Forests. N.T. at 456, Exhibit R-14 at 152. However, the *Shale-Gas Monitoring Report* does not evaluate the economic impacts to the Pennsylvania Wilds as a result of the gas extraction in the area. N.T. at 457.

G. DCNR New Management Strategies

The Respondents argue that the requirements in DCNR's current leases and DCNR's guidelines for oil and gas development ensure that DCNR is protecting the State Forests. DCNR's included additional provisions in its oil and gas leases in 2009 to address new management practices necessary for shale gas development. While these updated leases give DCNR greater ability to manage shale gas development that prior leases, they cannot stop the development of the shale gas extraction that will continue on almost 700,000 acres of State Forest and 250,000 acres of State Parks subject to oil and gas development for the next 50 years or more. Jim Grace made that clear in his testimony to this Court. The new DCNR leases do not alter his opinion that no additional acreage of State Forest land should be leased until the impacts of shale gas development on the existing leased acreage are understood. While approximately 140,000 acres of State Forest are subject to DCNR's new lease provisions, the remaining approximately 250,000 acres leased by DCNR are subject to older leases that do not contain the provisions

necessary to effectively manage shale gas development. *See Shale-Gas Monitoring Report*, pages 22-23. In addition, approximately 290,000 acres of State Forests have severed gas rights and are subject to private leases over which DCNR has little or no control.

None of the leases for gas development on State Forest land can control the cumulative impacts from the existing development (N.T. 68-69, 132);⁹ nor can the DCNR leases provide any control over with the impacts from gas extraction on private lands, both within and adjacent to both State Parks and Forests, or the approximately 250,000 acres of State Park land with severed mineral rights.

As for the guidelines that DCNR has developed for oil and gas development activities on the State Forest, they are just that—guidelines, not enforceable requirements. DCNR's guidelines related to shale gas extraction have been developed based on DCNR's on-the-ground experiences and are continuously updated as DCNR gains more knowledge about techniques available for

⁹ Dr. James R. Grace has had a distinguished career in academics and in management of Pennsylvania's State Forests. He has an undergraduate degree in forestry from the University of Vermont, a master's degree in forestry from Yale School of Forestry, and a doctorate degree in forest ecology from the Pennsylvania State University. He has served on the faculty of Department of Horticulture and Forestry at Rutgers University (1976-1983); on the faculty of School of Forestry at Penn State (1984-1987); as the Deputy Secretary at the former Department of Environmental Resources (1987-2000); as DCNR State Forester and Bureau of Forestry Director (2000-2007); as DCNR Deputy Secretary for Parks and Forestry (2007-2009); and currently as the Goddard Professor of Forestry at Penn State (2010- present). N.T. at 13-14.

management of gas development. N.T. 425-426. As these guidelines have been developed subsequent to the execution of the leases, the recommendations in the guidelines are not binding upon the gas operators. As Dan Devlin testified, DCNR strongly suggests that operators follow these guidelines, but cannot demand that they do so. N.T. at 426. Like the leases, the guidelines help DCNR minimize the degradation to the public natural resources from the shale gas extractions, but also like the leases, the guidelines do not eliminate the significant impacts to the State Forest inherent in this industrial activity.

H. DCNR's Need for Money to Protect Public Natural Resources

The Respondents and the Amici both argue that the leasing and sale of gas from the State Forest has and continues to generate so much money that their actions and decisions are justified. There is no relevance to this argument, but if there were, DCNR needs the money. The Respondents and the Amici imply that DCNR has all the money it needs to meet its constitutional and statutory obligations, but provide no accounting to demonstrate their argument.

The Respondents do not respond to the testimony of the former DCNR senior managers (Jim Grace, Mike DiBerardinis, John Norbeck, and Cindy Dunn), all of whom had years of experience at the department, that DCNR has as much as a billion dollar backlog of projects needed by both Parks and Forestry to repair and replace dams and other infrastructures, to restore mine drainage pollution problems

and abandoned oil and gas wells, purchase inholding and adjacent lands for buffering for both State Parks and Forests, to replace land lost to industrial gas development. In addition, the Oil and Gas Lease Fund is needed to provide grants and funding for projects to further support the Conservation Landscape Initiatives and local ecotourism and recreation economies based on our State Parks and Forests. Many projects have not had funding to date. N.T. at 344.

The Respondents and the Amici also ignore the fact that 80% of our State Parks are at risk from direct leasing activities that have not yet, but definitely will, occur in the future. Based on the Supreme Court Opinion in *Belden and Blake v. DCNR*, 600 Pa. 559, 969 A.2d 528 (2009), the only recourse DCNR has to protect the integrity of those parks is to use eminent domain to buy out private interests in the minerals under those parks.

The Respondents do not consider what the costs will be for DCNR to fully investigate the new and developing cumulative impacts from the gas extraction over the next 50 + years, let alone consider the cost to restore our State Parks and Forests from these cumulative impacts. To suggest that the Respondents have some overarching authority to ignore these costs is unsupported. The Respondents have the obligation as trustee to insure that the rights established under Article I § are being protected and that the public natural resources of our State Parks and Forests are conserved and maintained, and to insure that there is the revenue to do so.

The known costs that DCNR has identified must be met to protect the people's rights under Article I § 27. Respondents have not even attempted to evaluate those costs. To suggest that the government can take action that degrades or depletes the public natural resources of our State Parks and Forests because proposed budgetary spending exceeds general tax revenues is also untenable; yet this is the position they advocate.

I. Governor's 2014-3 Executive Not Relevant

The Respondents argue that the Governor's Executive Order 2014-03 is compliant with the three prong test of *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973) and that neither the Executive Order nor the conceptual non-surface disturbance leases violate Article I § 27. (Page 50 of Joint Brief). Neither the Governor's Executive Order nor the conceptual non-surface disturbance leases authorized by the Executive Order have been raised by the Petitioner as issues in its Second Amended Petition or in its Addendum to the Petition. They were only relevant to Petitioner's Application For Special Relief in the form of preliminary injunction to stop the proposed leases for funding the Governor's proposed \$75,000,000 transfer from the Oil and Gas Lease Fund to the General Fund and in stopping the Governor's proposed use of \$117,000,000 from the Oil and Gas Lease Fund to operate the General Fund.

Petitioner did offer the testimony of a number of witnesses at the hearing before this Court on the preliminary injunction request who testified that it is not possible to issue a lease for non-surface disturbance without impacting the public natural resources, but no such leases had or have been issued to challenge the Governor's Executive Order or the non-surface disturbance leases.. In fact, Respondents have agreed that no leasing will occur until this Court decides whether money from such leasing can be transferred to the General Fund.

Jim Grace testified that although the DCNR Natural Gas Advisory Committee for which he serves a chair was told at its April 2014 meeting of the proposal to lease more State Forest and State Park land to obtain \$75,000,000 for the 2014-15 budget, DCNR did not know where the leasing would occur. No details were provided as to where or how much land would be leased. Dr. Grace testified that based on his experience, although a lease with no surface disturbance is better than a lease with surface disturbance, there are going to be **“additional air impacts, water requirements, truck traffic, other activity.”** N.T. at 64.

John Norbeck was Director of Pennsylvania State Parks from April of 2006 to October of 2012. N.T. at 301. He testified that non-surface disturbance leases would cause additional impacts to State Parks if the wells were drilled on pads next to the Parks, **including air, noise, and light impacts.** N.T. at 309.

Dan Devlin, current Deputy Secretary for Forestry and Parks, testified that he had met with the Governor's Budget Secretary in the fall of 2013 and recommended against any further leasing. N.T. at 277. He testified that he was not consulted by the Governor or his staff prior to the announcement that the Governor was going to require leasing of more State Forest land. N.T. at 276. He testified that if the new non-surface leases were issued and wells to remove the gas from the leased land were located on adjoining private lands, DCNR would have no control over the activity on the private lands. N.T. at 291. Also, he testified that he had reviewed the Executive Order prior to its being issued, and made a few minor suggestions. He also testified that a non-surface lease would require drilling more new wells on existing pads, which **would cause more traffic and noise**. N.T. at 268.

Cindy Dunn was the DCNR Deputy Secretary for Conservation and Technical Services up to 2013. She testified about the Pennsylvania Wilds initiative to improve the economy of a twelve county area that is also the area of the Marcellus Shale development in north-central Pennsylvania. She described the impacts of the existing leases to the Pennsylvania Wilds, but when asked if continued leasing through non-surface disturbance leases would add to those impacts, the Respondents' Counsel objected and said that issue is appropriate for another time N.T. at 349. The Court stated: "Mr. Childe is at least part right. He's

sort of shooting at a nonexistent target here because at this point in time, there is nothing in the record to evaluate for purposes of concern or impact because there are no proposed leases. N.T. at 351.

The Court then let the witness testify as to what she knew would happen if the non-surface disturbances leases happened in the area of Pennsylvania Wilds. She answered that she knew that **additional leases would negatively impact the Wilds and the Pine Creek Rails to Trails because it would affect the visitors' experiences. The traffic, the noise, the disturbances would impact their experiences.** N.T. at 351. **Encountering industrial activity would impact their experiences.** N.T. at 353.

Respondents' request for summary judgment on the constitutionality of the Governor's Executive Order of 2014-3 and the concept of non-surface impact leases must be denied because neither of these concepts are issues raised by the Petitioner's pleadings, And, even if they were Respondents have not shown either that meet the requirements of summary judgment or the Declaratory Judgments Act.

J. Respondents Separation of Powers Argument

The Respondents and the Amici both repeatedly raise the specter of separation of powers doctrine. The separation of powers questions arise when there

are potential breaches between the duties of the three separate branches of government, not between the Governor and his appointees.

The fact that the Governor appoints the Secretary of DCNR does not mean that the Governor can dictate to the Secretary actions that are not compliant with either the Conservation and Natural Resources Act or the Constitution under Article I § 27. There is no dispute that the Governor can fire the Secretary of DCNR or any other political appointees. That does not authorize the Governor to make decisions and take actions over the objections of the Secretary that are contrary to the law and to the Constitution.

V. CONCLUSION

Petitioner respectfully requests this Honorable Court to find the requests for declaration as stated within Petitioner's Second Amended Petition, Motion for Summary Judgment, brief in support of summary judgment, and as stated herein. Petitioner also respectfully requests this Honorable Court to deny Respondents' Cross Motion for Summary Judgment.

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